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Memorandum
From the office of
Commissioner Boyd Dunn
Arizona Corporation Commission
1200 W. WASHINGTON
PHOENIX, ARIZONA
(602) 542-3935

Arizona Corporation Commission

DOCKETED

TO: Docket Control

MAY 30 2017

DATE: May 30, 2017

DOCKETED BY

A handwritten signature in black ink, appearing to be "BD", written over a horizontal line.

FROM: Commissioner Dunn's Office

SUBJECT: Arizona Corporation Commission Dockets E-01345A-16-0036, E-01345A-16-0123

Correspondence from Commissioner Dunn

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**ARIZONA CORPORATION
COMMISSION**

Boyd Dunn
Commissioner
Direct Line: (602) 542-3935
E-mail: dunn-web@azcc.gov

May 30, 2017

Re: May 30, 2017 Staff Meeting Agenda Item 1: Commission consideration, discussion, and possible vote related to Commissioner Burns' motions filed in the APS Rate Case Docket Nos. E-01345A-16-0036, E-01345A-16-0123.

Mr. Chairman,

I am writing to request Item 1 for the May 30, 2017 Staff Meeting be pulled from the agenda. I believe recent events in, *Burns v. Arizona Public Service Company*, Superior Court of Arizona, Maricopa County Case No. CV2017-001831, warrant postponement of our consideration.

As a preliminary matter, this item and other concerns regarding commissioner influence, have highlighted the urgent need for a Commission Code of Ethics. My hope is to develop a code for the Commission as soon as possible. To that end, workshop dates will be set and noticed in the coming week and topics for consideration will follow shortly thereafter. I look forward to a lively and productive discussion at those meetings.¹

As to postponement, I have read the Item 1 motions² and grappled with the legal concepts raised within them. I keep coming back to the same conclusion: I do not think these legal issues can be resolved today. Commissioner Burns has asked two different branches to resolve the same issue. I still do not support Burns' lawsuit against APS. I think Commissioner Burns faces some difficult legal hurdles including jurisdiction, timeliness, and standing before

¹ A copy of this letter and its attachment have also been filed in the docket "In the matter of Commission's Investigation and Promulgation of a Code of Ethics," AU-00000E-17-0079.

² This item asks us to address three motions filed in the APS rate case by an attorney that has not been admitted to appear in the rate case on behalf of Commissioner Burns. The evidentiary motion seeks to admit him as counsel for Burns. I note that it is inappropriate to consider motions filed by an attorney who is not properly before the tribunal. This letter does not suggest the Commission should waive this defect.

COMMISSIONERS
TOM FORESE - Chairman
BOB BURNS
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ANDY TOBIN
BOYD DUNN



Boyd Dunn
Commissioner
Direct Line: (602) 542-3935
E-mail: dunn-web@azcc.gov

**ARIZONA CORPORATION
COMMISSION**

the Court can even consider his substantive argument. However, my respect for the integrity of the judicial process trumps my desire to reach a substantive decision today.

Superior Court Judge Kiley held oral argument on APS' Motion to Dismiss the lawsuit last Thursday. My policy advisor attended those arguments and Judge Kiley took the matter under advisement at the close of the proceedings. We understand he entered an expedited ruling this morning requiring Commissioner Burns to file a motion to compel in the rate case and ordering the stay of the lawsuit pending further proceedings before the Commission. *See Under Advisement Ruling at 4-5, Burns v. Ariz. Pub. Serv. Co.*, CV2017-00183 (May 30, 2017), attached hereto as Exhibit A. If we discuss or vote on this item today we will be acting on matters that are not ripe for Commission consideration and will result in conflicting orders from the Commission and the Judge.

Let me be clear, I am asking for us to postpone consideration, not avoid it altogether. We are rapidly approaching the conclusion of the APS rate case. The reply briefs are due on June 1st and the Recommended Opinion and Order ("ROO") is anticipated shortly thereafter. We will be hearing the entire case in a matter of weeks. This issue should only be considered after the parties have had adequate time to brief any motion to compel filed by Commissioner Burns. We should take on the merits but only at a time when we can bring some finality to the proceedings and with the full record before us.³ Now is just not that time and I would like the item to be pulled.

Sincerely,

A handwritten signature in black ink, appearing to read "Boyd W. Dunn", written over a horizontal line.

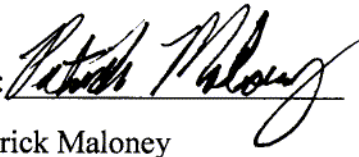
Commissioner Boyd W. Dunn
Chairman of the Ethics Committee

Enclosure

³ Judge Kiley has further ordered a status conference on July 10, 2017 to "discuss the status of the matter and scheduling of such further proceedings as may be appropriate." *See Under Advisement Ruling at 4.*

Certification of Service

On this 30th day of May, 2017, the foregoing document was filed with Docket Control as Correspondence from Commissioner, and copies of the foregoing were mailed on behalf of Boyd W. Dunn, Commissioner - A.C.C. to the following who have not consented to email service. On this date or as soon as possible thereafter, the Commission's eDocket program will automatically email a link to the foregoing to the following who have consented to email service.

By: 
Patrick Maloney

Assistant to Boyd W. Dunn

Matthew E. Price

JENNER & BLOCK
1099 New York Avenue, NW, Suite 900
Washington District of Columbia 20001-4412

Thomas Jernigan

Federal Executive Agencies
U.S. Airforce Utility Law Field Support Center
139 Barnes Drive, Suite 1
Tyndall Air Force Base Florida 32403

thomas.jernigan.3@us.af.mil
ebony.payton.crt@us.af.mil
andrew.unsicker@us.af.mil
lanny.zieman.1@us.af.mil
natalie.cepak.2@us.af.mil

Consented to Service by Email

Kurt Boehm

BOEHM, KURTZ & LOWRY
36 E. Seventh St. Suite 1510
Cincinnati Ohio 45202

Nicholas J. Enoch

LUBIN & ENOCH, PC
349 N. Fourth Ave.
Phoenix Arizona 85003

Richard Gayer

526 W. Wilshire Dr.
Phoenix Arizona 85003
rgayer@cox.net

Consented to Service by Email

T. Hogan

ARIZONA CENTER FOR LAW IN THE PUBLIC
INTEREST
514 W. Roosevelt Street
Phoenix Arizona 85003

Timothy M. Hogan

ARIZONA CENTER FOR LAW IN THE PUBLIC INTERST
514 W. Roosevelt St.
Phoenix Arizona 85003

thogan@aclpi.org
ken.wilson@westernresources.org
schlegelj@aol.com
ezuckerman@swenergy.org
bbaatz@aceee.org
briana@votesolar.org
cosuala@earthjustice.org
dbender@earthjustice.org
cfitzgerrell@earthjustice.org

Consented to Service by Email

Timothy J. Sabo

SNELL & WILMER, LLP
One Arizona Center
400 East Van Buren, 19th Floor
Phoenix Arizona 85004

tsabo@swlaw.com
jhoward@swlaw.com
docket@swlaw.com
pwalker@conservamerica.org

Consented to Service by Email

Michael Patten

SNELL & WILMER, LLP
One Arizona Center
400 East Van Buren Street
Phoenix Arizona 85004

mpatten@swlaw.com
jhoward@swlaw.com
docket@swlaw.com
BCarroll@tep.com

Consented to Service by Email

Thomas A Loquvam

PINNACLE WEST CAPITOL CORPORATION
400 N. 5Th St, MS 8695
Phoenix, Arizona 85004

Thomas.Loquvam@pinnaclewest.com
Thomas.Mumaw@pinnaclewest.com
Melissa.Krueger@pinnaclewest.com
Amanda.Ho@pinnaclewest.com
Debra.Orr@aps.com
prefo@swlaw.com

Consented to Service by Email

Albert H. Acken

One N. Central Ave Ste 1200
Phoenix Arizona 85004

aacken@rcalaw.com
ssweeney@rcalaw.com
slofland@rcalaw.com
jjw@krsaline.com

Consented to Service by Email

Cynthia Zwick

ARIZONA COMMUNITY ACTION ASSOCIATION
2700 N. Third St. - 3040
Phoenix Arizona 85004

czwick@azcaa.org
khengehold@azcaa.org

Consented to Service by Email

Jay I. Moyes

MOYES SELLERS & HENDRICKS, LTD
1850 N. Central Ave. - 1100
Phoenix Arizona 85004

JasonMoyes@law-msh.com
jimoyes@law-msh.com
jim@harcuvar.com

Consented to Service by Email

Daniel Pozefsky

RUCO
1110 West Washington, Suite 220
Phoenix Arizona 85007

Greg Patterson

MUNGER CHADWICK
916 W. Adams Suite 3
Phoenix Arizona 85007

Andy Kvesic

ARIZONA CORPORATION COMMISSION
Director- Legal Division
1200 West Washington
Phoenix Arizona 85007

LegalDiv@azcc.gov
utildivservicebyemail@azcc.gov
MScott@azcc.gov
CHains@azcc.gov
WVanCleve@azcc.gov
TFord@azcc.gov
EVanEpps@azcc.gov
CFitzsimmons@azcc.gov
KChristine@azcc.gov
EAbinah@azcc.gov

Consented to Service by Email

Anthony Wanger

IO DATA CENTERS, LLC
615 N. 48th St
Phoenix Arizona 85008

Meghan H. Grabel

OSBORN MALEDON, PA
2929 N. Central Avenue Suite 2100
Phoenix Arizona 85012

mgrabel@omlaw.com
gyaquinto@arizonaic.org

Consented to Service by Email

Giancarlo Estrada

KAMPER ESTRADA, LLP
3030 N. 3rd Street, Suite 770
Phoenix Arizona 85012

gestrada@law.phx.com
kfox@kfwlaw.com
kcrandall@eq-research.com

Consented to Service by Email

Mary R. O'Grady

OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix Arizona 85012

Scott S. Wakefield

HIENTON & CURRY, PLLC
5045 N 12th Street, Suite 110
Phoenix Arizona 85014-3302

swakefield@hclawgroup.com
mlougee@hclawgroup.com
Stephen.chriss@wal-mart.com
Greg.tillman@walmart.com
chris.hendrix@wal-mart.com

Consented to Service by Email

Garry D Hays

LAW OFFICES OF GARRY D. HAYS, PC
2198 East Camelback Road, Suite 305
Phoenix Arizona 85016

ghays@lawgdh.com

Consented to Service by Email

Patrick J. Black

FENNEMORE CRAIG, P.C.
2394 E. Camelback Rd, Ste 600
Phoenix Arizona 85016

pblack@fclaw.com
khiggins@energystrat.com

Consented to Service by Email

John William Moore, Jr.

MOORE BENHAM & BEAVER, PLC
7321 N. 16th Street
Phoenix Arizona 85020

Tom Harris

ARIZONA SOLAR ENERGY INDUSTRIES ASSOCIATION
2122 W. Lone Cactus Dr. Suite 2
Phoenix Arizona 85027

Tom.Harris@AriSEIA.org

Consented to Service by Email

Craig A. Marks

CRAIG A. MARKS, PLC
10645 N. Tatum Blvd.
Suite 200-676
Phoenix Arizona 85028

Craig.Marks@azbar.org
Pat.Quinn47474@gmail.com

Consented to Service by Email

Ann-Marie Anderson

WRIGHT WELKER & PAUOLE, PLC
10429 South 51st Street, Suite 285
Phoenix Arizona 85044

aanderson@wwpfirm.com
sjennings@aarp.org
aallen@wwpfirm.com
john@johncoffman.net

Consented to Service by Email

Dennis M. Fitzgibbons

FITZGIBBONS LAW OFFICES, PLC
P.O. Box 11208
Casa Grande Arizona 85230

denis@fitzgibbonslaw.com

Consented to Service by Email

Court S. Rich

ROSE LAW GROUP, PC
7144 E. Stetson Drive, Suite 300
Scottsdale Arizona 85251

crich@roselawgroup.com
hslaughter@roselawgroup.com
cledford@mcdonaldcarano.com

Consented to Service by Email

Thomas E. Stewart

GRANITE CREEK POWER & GAS/GRANITE CREEK
FARMS

5316 East Voltaire Avenue
Scottsdale Arizona 85254-3643

tom@gcfaz.com

Consented to Service by Email

Greg Eisert

SUN CITY HOME OWNERS ASSOCIATION
10401 W. Coggins Drive
Sun City Arizona 85351

gregeisert@gmail.com
steven.puck@cox.net

Consented to Service by Email

Albert E. Gervenack

SUN CITY WEST PROPERTY OWNERS & RESIDENTS
ASSOCIAT
13815 Camino Del Sol
Sun City West Arizona 85375

al.gervenack@porascw.org
rob.robbins@porascw.org
Bob.miller@porascw.org

Consented to Service by Email

Patricia C. Ferre

P.O. Box 433
Payson Arizona 85547
pFerreact@mac.com

Consented to Service by Email

Lawrence V. Robertson, Jr.

210 Continental Road, Suite 216A
Green Valley Arizona 85622
tubaclawyer@aol.com

Consented to Service by Email

L. Robertson, Jr.

210 Continental Road, Suite 216A
Green Valley Arizona 85622

Charles Wesselhoft

Pima County Attorney's Office
32 North Stone Avenue, Suite 2100
Tucson Arizona 85701
Charles.Wesselhoft@pcao.pima.gov

Consented to Service by Email

Warren Woodward

200 Sierra Road
Sedona Arizona 86336
w6345789@yahoo.com

Consented to Service by Email

Robert Pickels, Jr.

Sedona City Attorney's Office
102 Roadrunner Drive
Sedona Arizona 86336
rpickels@sedonaaz.gov

Consented to Service by Email

Exhibit A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-001831

05/26/2017

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
S. Marx
Deputy

ROBERT BURNS

WILLIAM A RICHARDS

v.

ARIZONA PUBLIC SERVICE COMPANY, et al. MARY R O'GRADY

UNDER ADVISEMENT RULING

Plaintiff Robert Burns in his official capacity as a member of the Arizona Corporation Commission (the "Commission") caused to be issued two subpoenas (the "Subpoenas"), one to Defendant Arizona Public Service ("APS") and the other to Defendant Pinnacle West Capital Corporation ("Pinnacle West"). Complaint at ¶ 91 and Exhibit 1 thereto.¹ The Subpoenas require the production, *inter alia*, of documents relating to the Defendants' "expenditures or donations of funds for any purpose," including "charitable contribution[s]," "political contribution[s]," and "expenditure[s] made...for lobbying purposes." Exhibit 1 to Complaint. Alleging that APS and Pinnacle West dispute his authority to issue the Subpoenas and have refused, in whole or in part, to comply with them, the Plaintiff seeks a declaration "that he is fully authorized and entitled to demand from the Defendants...full and timely compliance with the [S]ubpoenas..." Complaint at ¶¶ 96, 109-110, 114 and Exhibit 4 thereto.

The Defendants have filed a Motion to Dismiss. In support of their Motion, they assert, *inter alia*, that the Plaintiff "has never sought any order from the Commission compelling compliance with the [S]ubpoenas," Motion at Dismiss at pp. 5-6, and that "judicial review" is not

¹ Each of the subpoenas was also directed to Defendant Donald E. Brandt in his capacity as Chairman, President, and Chief Executive Officer of each corporate Defendant. Complaint at ¶ 91 and Exhibit 1 thereto.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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appropriate until the Commission has “complete[d] its internal decision-making process.” Reply to Plaintiff’s Response to Motion to Dismiss (“Reply”) at p. 2. The appropriate procedure, the Defendants argue, is for the Plaintiff to

file a motion to compel; the Commission will rule on that motion; and an aggrieved party can then seek judicial review.

Id.

The Plaintiff disagrees, asserting that he acted within the scope of his constitutional authority in issuing the Subpoenas, that determining the scope of his constitutional authority is a matter “within the traditional role and expertise of the courts, not the [Commission],” and that requiring him to pursue remedies before the Commission prior to seeking judicial relief would be “futile.” Plaintiff’s Response to Defendants’ Motion to Dismiss (“Response”) at pp. 3, 14, 16.

After reviewing the authorities cited, the Court finds that applicable statute and procedural rules require the Plaintiff to file a motion to compel with the Commission to enforce the Subpoenas before seeking judicial relief. *See* Ariz.R.Civ.P. 45(c)(5)(B); Ariz.Admin.Code R14-3-101(A); A.R.S. § 40-243.² Although the Plaintiff asserted at the May 25, 2017, Oral Argument that he enjoys authority under the Arizona Constitution to issue and enforce subpoenas that is independent of the Arizona Rules of Civil Procedure, this assertion is not supported by the text of the Arizona Constitution itself. The provision of the Arizona Constitution conferring authority on “[t]he corporation commission, and the several members thereof,” to “enforce the...production of evidence by subpoena” expressly states that this enforcement power shall be the same as that “of a court of general jurisdiction.” Ariz.Const. Art. XV, § 4. Enforcement of subpoenas by a court of general jurisdiction, *i.e.*, the Superior Court, is governed by the Arizona Rules of Civil Procedure. *See* Ariz.R.Civ.P. 45(e), (f).

Requiring the Plaintiff to file a motion to compel with the Commission and obtain a ruling before seeking judicial relief would be consistent with case law holding that parties must pursue available administrative remedies before seeking court intervention. *See, e.g., Minor v. Cochise County*, 125 Ariz. 170, 172, 608 P.2d 309, 311 (1980) (“[W]here a claim is cognizable in the first instance by the administrative agency alone[,]...judicial interpretation is withheld

² At Oral Argument on May 25, 2017, the Plaintiff asserted that he need not seek to enforce the Subpoenas in the manner prescribed in Rule 45(c)(5)(B), Ariz.R.Civ.P., because the provision of the Commission’s Rules of Practice and Procedure that incorporates the Arizona Rules of Civil Procedure excludes investigations. *See* Ariz.Admin.Code R14-3-101(A). The Plaintiff’s assertion that the Subpoenas are not governed by Rule 45 is contradicted by the fact that the Subpoenas themselves state that they were issued pursuant to Rule 45 (as well as pursuant to other constitutional and statutory authority). *See* Exhibit 1 to Complaint.

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MARICOPA COUNTY

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until the administrative process has run its course.”); *Original Apt. Movers v. Waddell*, 179 Ariz. 419, 421, 880 P.2d 639, 641 (App. 1993) (after Department of Revenue commenced audit, business refused to disclose subpoenaed records and filed declaratory judgment action seeking declaration that it was statutorily exempt from transaction privilege tax; affirming dismissal of complaint, Court held that business was not entitled to “preempt the administrative investigation by rushing to the tax court before all factual questions have been subjected to [agency’s] audit”). *Cf. Carrington v. Ariz. Corp. Comm’n*, 199 Ariz. 303, 304, 18 P.3d 97, 98 (App. 2000) (party challenging subpoena issued by Commission filed complaint for special action relief only after filing motion with Commission to quash the subpoena, which was denied). Moreover, requiring the Plaintiff to proceed in this manner would be consistent with the well-established principles that “a court should not act upon subject matter that is peculiarly within the agency’s specialized field without taking into account what the agency has to offer,” *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 430, 586 P.2d 987, 991 (App. 1978) (citation and internal quotations omitted), and that a court should respect “administrative agency autonomy” by avoiding “premature...intervention in inchoate administrative proceedings.” *Medina v. Ariz. Dep’t of Transp.*, 185 Ariz. 414, 417, 916 P.2d 1130, 1133 (App. 1995).

Finally, requiring the Plaintiff to file a motion to compel with the Commission and obtain a ruling before seeking judicial relief may - depending on whether the motion is granted or denied - obviate the need for the Court to address the constitutional issues raised in the Plaintiff’s Complaint. A court must, of course, avoid reaching constitutional issues if it is not necessary to do so. *See Cronin v. Sheldon*, 195 Ariz. 531, 542, 991 P.2d 231, 242 (1999) (“Constitutional issues will not be determined unless squarely presented in a justiciable controversy.”) (citation, internal quotations, and internal punctuation omitted).

The Court therefore finds that a determination of the issues raised in the Complaint should be deferred until a motion to compel compliance with the Subpoenas has been filed with the Commission and the Commission has had an opportunity to rule on it.³

³ The Defendants have filed, with the Commission, two motions to quash the Subpoenas. The Commission has not acted on either of the motions to quash (even though the first of the motions was filed over seven months ago, in September 2016). The parties disagree on whether the motions to quash are still pending before the Commission, or if they have been deemed denied as a result of the Commission’s failure to act on them within a specified time period. *Compare* Motion to Dismiss at p. 12 (arguing that the Plaintiff is not entitled “to short-circuit the administrative process by seeking judicial enforcement while a motion to quash is still pending before the Commission”) *with* Response at p. 16 (arguing that the Commission “allowed both of [the] Defendants’ motion to quash to be administratively denied by inaction”). The Court need not resolve the parties’ dispute over whether the Defendants’ motions to quash are still pending, however, because the enforcement of a subpoena to which objection has been made cannot be effected by a ruling on a motion to quash, but requires the filing of a motion to compel. *See* Ariz.R.Civ.P. 45(c)(5)(B); Ariz.Admin.Code R14-3-101(A).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-001831

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The Court sees no justification, however, for the Defendant's request that this case be dismissed. Instead, the Court finds that a stay of these proceedings while the Commission considers a request to compel compliance with the Subpoenas would be appropriate. Although the Defendants argue that "respect" for the "constitutional authority" of a "coordinate branch of government" to "complete its internal decision-making process before the commencement of judicial review" requires the Court to "dismiss this case," Reply at p. 2, an order staying these proceedings would respect the Commission's authority to consider enforcement of the Subpoenas in the first instance just as much as a dismissal would. Staying, rather than dismissing, this case is an approach that finds support in case law. *Medina*, 185 Ariz. at 416, 916 P.2d at 1132 (after agency filed motion to dismiss on basis that petitioner had failed to exhaust administrative remedies by seeking administrative rehearing, trial court instead "temporarily declin[ed] to exercise jurisdiction" while petitioner filed motion for rehearing with agency and then "re-exercised jurisdiction" once rehearing was denied) (internal quotations omitted). Moreover, staying, rather than dismissing, this case would better conserve the parties' resources and facilitate the timely resumption of judicial proceedings in the event such proceedings are warranted.

Accordingly,

IT IS ORDERED staying this matter pending further proceedings before the Arizona Corporation Commission.

IT IS FURTHER ORDERED setting a telephonic Status Conference on July 10, 2017 at 1:30 p.m. (30 minutes allotted) before this Division to discuss the status of the matter and the scheduling of such further proceedings as may be appropriate. Counsel for the Plaintiff shall initiate the joint call to the Court at 602-372-3839.

IT IS FURTHER ORDERED denying the Motion to Dismiss in all other respects except as to the relief granted above.

NOTE: All court proceedings are recorded by audio and video method and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140.00 for a half-day and \$280.00 for a full day.